

No. 39202-0-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

Vs.

CLIFFORD STONE JR.

Appellant.

09 NOV 19 AM 10:59
STATE OF WASHINGTON
BY [Signature]
MICHAEL GOLDEN

FILED
COURT OF APPEALS
DIVISION II

Appeal from the Superior Court of Washington for Lewis County

RESPONSE BRIEF

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STATEMENT OF THE CASE

The facts of this case are set out in the documents submitted at the stipulated facts trial, together with findings made by the trial court at that trial. See, CP 30-56; 4/21/09 RP 1-7.

ARGUMENT

A. SUFFICIENT EVIDENCE SUPPORTS STONE'S CONVICTION FOR FELONY DRIVING UNDER THE INFLUENCE.

Stone argues that there was insufficient evidence to prove that he was the same person who was convicted of vehicular assault by driving under the influence in 1990, and that there was insufficient evidence to prove that the 1990 vehicular assault conviction was committed "while under the influence of intoxicating liquor or any drug." Brief of Appellant 10. These arguments are not persuasive.

Evidence is sufficient to support a conviction if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 638 (1980). "[W]hen the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). "In a stipulated facts trial, the judge or

jury still determines the defendant's guilt or innocence; the State must prove beyond a reasonable doubt the defendant's guilt; and the defendant ... by the stipulation, agrees that what the State presents ... the witnesses would say." State v. Johnson, 104 Wn.2d 338, 342, 705 P.2d 773 (1985). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, 119 Wn.2d at 201. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn there from. Salinas, 119 Wn.2d at 201. Credibility determinations are for the trier of fact and will not be reviewed. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the evidence's overall persuasiveness. State v. Lubers, 81 Wn.App. 614, 619, 915 P.2d 1157, review denied, 130 Wn.2d 1008 (1996). Circumstantial evidence is treated equally with direct evidence. State v. Varga, 151 Wn.2d 179, 201, 86 P.3d 139 (2004).

Stone was convicted at a bench trial upon stipulated facts. The facts and documents that were considered in the stipulated facts trial are found at CP 27-56. The trial court's oral findings can

be found in the report of proceedings for the stipulated facts trial.

4/21/09 RP 1-7.

Identity of Defendant

It should be noted that Stone did not make any objections or argument below as to the sufficiency of the evidence regarding any element of the charged crime or as to the sufficiency of the evidence proving that the prior vehicular assault (which raised the DUI to a felony) was committed while under the influence of intoxicants. 4/21/09 RP 1-7. Nor did he object to the trial court's finding that he was the same Clifford Stone who was convicted of the vehicular assault in 1990. 4/21/09 RP 4,5. However, on appeal, Stone claims that there was insufficient evidence presented to prove that the Clifford Stone at trial was the same Clifford Stone who was convicted of the vehicular assault in 1990. However, the trial court did find sufficient evidence to support this factor. The trial court made the following oral findings regarding this issue:

THE COURT: There is an information attached pursuant to a certified copy, Cause No. 90-1-00082-1, whereby the named defendant, Clifford L. Stone, Jr., was charged with vehicular assault. . . . The defendant apparently pled guilty on 4/24/1990 to vehicular assault, was given 180 days and community supervision for 12 months. . . . the fingerprints are attached.

THE COURT: The record reflects that Deputy Kimsey requested--was requested to and did

compare the fingerprints and determined that -- Clifford L. Stone is the defendant--Clifford L. Stone, Jr., named defendant in 90-1-82-1, is in fact the same Clifford Lee Stone who is subject to the prosecution in this cause, which is 2009-1-143-4.

4/21/09 RP 4,5 (emphasis added). The trial court thus found that the Clifford Stone in this case was the same Clifford Stone who had been convicted of the vehicular assault in 1990. Id.

There was also stipulated documentation submitted for the court's consideration at the stipulated facts trial. There is a copy of Clifford Stone's driver's license, with his picture on it. CP 31. There is also a police report submitted by Trooper C.R. Ecklund regarding Stone's February 19, 2009, DUI arrest. CP 32-38. There is also a police report from Detective Kimsey which discusses the Detective's examination of fingerprints taken from Stone upon his arrest for the DUI on February 19, 2009. CP 44. Kimsey states that he compared Stone's prints taken on February 19, 2009 (Stone's arrest for the current DUI) with the prints on a judgment and sentence for Clifford Stone Jr. in Lewis County cause number 90-1-82-1. Kimsey stated that Stone's prints taken on 2/19/09 following his arrest for this DUI matched the prints on the 1990 judgment and sentence for the vehicular assault. CP 44, 46,47, 56. Detective Kenepah then reviewed Detective Kimsey's findings regarding the fingerprints, and agreed with Kimsey's findings. CP

48. All of this evidence proves that Stone, the defendant in this current case, is the same defendant/person who was convicted of vehicular assault in 1990. His argument to the contrary is without merit.

Prior Vehicular Assault While Under the Influence

Stone also argues that there was insufficient evidence presented during the stipulated facts trial to prove that his 1990 vehicular assault conviction was committed while Stone was under the influence of alcohol or drugs. Brief of Appellant 13,14. There is no merit to this contention.

Stone's argument on this issue is confusing at best. Stone acknowledges that the charging document for the 1990 offense states as follows:

By this Information the Prosecuting Attorney for Lewis County accuses the defendant(s) of the crime of: Vehicular Assault which is a violation of RCW 46.61.522 . . . in that the defendant(s) on or about March 19, 1990, in Lewis County, Washington, then and there did operate and drive a vehicle in a reckless manner **and while under the influence of intoxicating liquor** and thereby proximately caused serious bodily injury to another.

CP 34 (emphasis added); Brief of Appellant 14. Stone claims that while this language "proves that the person named was charged with vehicular assault under both alternatives, it certainly does not prove that the named individual was convicted of that offense,

much less that he was convicted under the driving while intoxicated alternative." Brief of Appellant 14 (emphasis added). However, as can be seen from the language of the charging document quoted above, the relevant phrasing says "and while under the influence of intoxicating liquor," not "or under the influence of . . .". CP 34 (emphasis added). Thus, Stone's vehicular assault charge was not charged "in the alternative" at all. Instead, the vehicular assault was charged to allege that Stone committed the vehicular assault by driving in a reckless manner AND while under the influence of intoxicating liquor. CP 14. Nonetheless, Stone repeatedly refers to this crime as being charged "in the alternative." It clearly was not. Thus, Stone's argument on this issue is misguided and should be disregarded.

Furthermore, the supporting documents as to the vehicular assault conviction show beyond any doubt that Stone's vehicular assault was committed while Stone drove while under the influence of intoxicating liquor. Again, we must keep in mind that because this was a stipulated facts trial, that "the defendant ... by the stipulation, agrees that *what the State presents ... the witnesses would say.*" State v. Johnson, 104 Wn.2d at 342 (emphasis added). Keeping this in mind, we need only look at the Affidavit of Probable Cause filed in the vehicular assault case to see that Stone

was most certainly driving under the influence when he wrecked the vehicle causing substantial injury to a passenger. According to that affidavit:

Just prior to 11:00 p.m. on March 19, 1990, Trooper Colvin . . . was called to investigate a one car injury accident near Winlock. . . . Trooper Colvin arrived after the emergency medical technicians arrived. They were working on a passenger in the vehicle who had lost a large amount of blood. Walking near the vehicle was an individual later identified as the defendant. Also in the area was a woman identified as Gena Webb. Webb stated that a car had run them off the road and that the defendant had been driving their vehicle. Colvin then asked the defendant what had occurred. The defendant started yelling at him stating that he wanted to be with his girlfriend.

Colvin noticed a moderate to strong odor of alcohol and noticed that the defendant had difficulty maintaining his balance and was not sure footed, his speech was mumbled, his eyes were watery and bloodshot. Webb stated that the defendant had been drinking. . . . Before leaving the scene with the defendant, Trooper Colvin noticed four cans of Schmidt Beer to the left of the vehicle. One was full and there were three empties. . . .

At Providence Hospital the defendant stated that he . . . had been drinking an unknown quantity of Schmidt Beer in twelve ounce cans starting at 7:00 p.m. He stated that he had been drinking with his friends in Longview, but was uncertain of the time of his last drink. . . .

CP 51, 52 (emphasis added).

These facts set out in this affidavit filed in the vehicular assault case--said affidavit being a part of record stipulated to by

Stone in this case--and considering the deferential standard of review--show beyond any doubt, frankly, that Stone committed that vehicular assault while under the influence of intoxicating liquor. There was alcohol coming from Stone's breath, his speech was slurred, he had difficulty walking, and he admitted he had been drinking, and then there was the crash itself. CP 51,52. The stipulated facts show that the vehicular assault was committed by Stone while he was under the influence of intoxicating liquor. The facts simply cannot be interpreted any other way. Furthermore, the judgment and sentence for the vehicular assault contains a provision stating that Stone was to "refrain from the use of alcohol"-this provision would not have been proper unless the crime was alcohol related. CP 55.

In sum, the trial court's findings together with the documents submitted via Stone's own stipulation contain sufficient evidence to support the crime of *felony* Driving Under the Influence.

Accordingly, Stone's conviction should be affirmed.

B. NO COLLOQUY IS REQUIRED WHEN WAIVING THE RIGHT TO A JURY TRIAL AND HERE STONE SIGNED A WRITTEN WAIVER AND THE RECORD SHOWS THE WAIVER WAS ENTERED KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY.

Stone claims that his waiver of his right to a jury trial was invalid because of "the shortness of the colloquy and the failure of

the trial court to adequately inform . . . [him] of the nature of the jury waiver." This argument ignores applicable law and is thus without merit.

Review of the sufficiency of a jury trial waiver is *de novo* because it implicates the waiver of an important constitutional right. See, United States v. Villa-Fabela, 882 F.2d 434, 437 (9th Cir. 1989)(*de novo* review applied to claims that waiver of counsel not knowing and intelligent), *overruled on other grounds by United States v. Proa-Tovar*, 975 F.2d 592 (9th Cir. 1992). "The right to jury trial, like the right to remain silent and the right to confront witnesses, is treated differently and is easier to waive." State v. Pierce, 134 Wn.App. 763, 770-773, 142 P.3d 610 (2006)(emphasis added), citing State v. Bugai, 30 Wn.App. 156, 157, 632 P.2d 917 (1981). A defendant may waive the right to jury trial, so long as he acts knowingly, intelligently, voluntarily, and free from improper influences. State v. Stegall, 124 Wn.2d 719, 724-25, 881 P.2d 979(1994). A reviewing court will not presume that a defendant waived his jury trial right unless there is an adequate record showing that the waiver occurred. State v. Woo Won Choi, 55 Wn.App. 895, 903, 781 P.2d 505 (1989), *superseded on other grounds as recognized by State v. Anderson*, 72 Wn.App. 453, 458-59, 864 P.2d 1001 (1994).

"No colloquy is required for a waiver of the right to a jury; all that is required is a personal expression of waiver by the defendant." Stegall, 124 Wash.2d 719, 724, 725, 730, 881 P.2d 979(emphasis added)(an explanation of the consequences of waiver is not required to be placed on the record). Furthermore, "[a] written waiver, as CrR 6.1(a) requires, is not determinative but is *strong evidence that the defendant validly waived the jury trial right.*" State v. Pierce, 134 Wn.App. 763, 770-773, 142 P.3d 610 (2006)(emphasis added), *citing* Woo Won Choi, 55 Wn.App. at 904. In sum, "[t]o meet constitutional muster, the record must affirmatively show that the defendant knew of the right to a jury trial and personally and expressly waived it. These requirements are implemented by CrR 6.1(a), which requires a written waiver of a defendant's right to a jury trial." State v. Brand, 55 Wn.App. 780, 785, 780 P.2d 894 (1989). Additionally, "[a]n attorney's representation that his client knowingly, intelligently, and voluntarily relinquished his jury trial rights is also relevant." Id. The State has the burden of proving the waiver was valid. State v. Wicke, 91 Wash.2d 638, 645, 591 P.2d 452 (1979).

The jury trial waiver in the present case meets all of the requirements noted in the above-set-out law. Here, Stone

signed a written jury waiver in open court with the advice of his attorney. 4/16/2009 RP 1-3. Additionally, the trial judge questioned Stone about waiving this right as follows:

COURT: Mr. Stone, you understand you have a right to a jury trial and have this matter decided by a jury of 12 people? Do you understand that?

STONE: Yes.

COURT: By signing a waiver you give that right up and that means that all of the decisions will be made by one person, it will be the Judge who will make all those decisions. Do you understand that?

STONE: Yes, I do.

COURT: And you've discussed that completely with your attorney?

STONE: Yes, I have.

COURT: And you're signing that waiver voluntarily?

STONE: Yes.

COURT: I'll approve the waiver subject, of course, to final approval by the trial judge. Right now that is Judge Brosey.

4/16/09 RP 2,3. And, the written jury waiver signed by Stone contains the following language: "Defendant understands he has the right to a jury trial and hereby waives that right and consents to a stipulated bench trial. Dated this 16th day of

April, 2009." CP 60. The jury waiver is signed by Stone and his attorney. Id.

These facts show that the combination of the written, signed jury waiver on advice of counsel, plus the trial court's colloquy with Stone meet all of the necessary requirements to show that the waiver was entered knowingly, intelligently and voluntarily. Stone argues that the colloquy was too short and was inadequate. Brief of Appellant 19. But, in the first place--as cited above-- there does not have to be any colloquy before accepting a jury waiver. Stegall, supra. Nonetheless-- even though it is not required-- the trial court inquired of Stone anyway. 4/21/09 RP 1-3.

Stone also claims another non-existent "requirement" for acceptance of a jury waiver when he argues that the colloquy was insufficient because there is no indication that Stone "understood that . . . there had to be complete jury unanimity in order to enter a guilty verdict." Brief of Appellant 19. But there is no such requirement as far as Respondent has found. Tellingly, Stone does not cite any authority standing for that particular proposition. Id. Indeed, the cases cited by Stone discuss jury unanimity-- but not in the context of a jury waiver. Brief of Appellant 20, citing State v. Gimarelli, 104 Wn.App. 370, 20 P.3d 430 (2001)(jury unanimity regarding prior convictions); State v. Klimes, 117 Wn.App. 758, 73

P.3d 416 (2003)(jury unanimity regarding alternative means of committing the crime).¹ Arguments not supported by citation to *relevant* authority need not be considered by this Court. State v. Hoffman 116 Wash.2d 51, 71, 804 P.2d 577, 588 (1991).

Furthermore, none of the cases cited by Stone apply to the facts presented here. In State v. Williams, 23 Wn.App. 694, 598 P.2d 731 (1979), there was no written waiver of jury trial and no colloquy between Williams and the court. Id. That is in contrast to this case, where there is both a written jury waiver and a colloquy occurred. 4/21/09 RP 1-3; CP 60. Nor does the Borboa case cited by Stone apply here. State v. Borboa, 124 Wn.App. 779, 792, 102 P.3d 183 (2004).

In Borboa, the defendant was tried by a jury but the trial court then imposed an exceptional sentence-- without having the jury decide the aggravator. Id. On appeal, the State argued that Borboa had waived his right to have a jury determine one of the aggravating factors because he admitted one of the factors in his appeal brief. Id. But the appellate court held that there had been no waiver because Borboa had not known of, nor had he agreed to,

¹ Not only does the Klimes case not discuss jury waivers, but that case has also been recognized as "overruled" or "abrogated." See State v. Johnson, 132 Wn.App. 400, 132 P.3d 737 (2006)(overruling of Klimes recognized); State v. Spencer, 128 Wn.App. 132, 114 P.3d 1222(2005)(abrogation of Klimes recognized).

give up his right to have a jury find the facts to support an exceptional sentence. Id. Those facts are completely distinguishable from the facts surrounding the jury waiver in the present case, and Borboa thus does not apply here. This Court should accordingly find that Stone's waiver of his right to a jury trial was valid.

C. STONE'S ARGUMENT REGARDING THE ISSUE OF THE COMBINATION OF CONFINEMENT TIME AND COMMUNITY CUSTODY EXCEEDING THE STATUTORY MAXIMUM IS WITHOUT MERIT AFTER *IN RE BROOKS*, BUT THE CLERICAL ERROR IN HIS SENTENCE MUST BE CORRECTED BECAUSE IT IS CONFUSING.

Stone claims that his sentence exceeds the statutory maximum even though there is limiting language in the judgment and sentence stating that the combined "community confinement" and community custody shall not exceed the statutory maximum for the crime. CP 17. Subsequent case law has decided this issue, but because the provision in Stone's judgment and sentence uses the confusing term "community confinement" when it should instead say "confinement," his judgment and sentence needs to be corrected to cure this scrivener's error.

The Washington Supreme Court's decision in *In re Brooks*, 166 Wn.2d 664, 675, 211 P.3d 1023 (2009) disposes of Stone's argument regarding his combined term of confinement plus the

community custody term exceeding the statutory five year maximum for his crime. In Brooks, the Court held that "when a defendant is sentenced to a term of confinement and community custody that has the potential to exceed the statutory maximum for the crime, the appropriate remedy is to remand to the trial court to amend the sentence and explicitly state that the combination of confinement and community custody shall not exceed the statutory maximum." Id. (emphasis added).

Here, the court tried to add the language as later approved in Brooks to the judgment and sentence but the phrasing is confusing because it contains an extra word. CP 17. Accordingly, the State agrees that the judgment and sentence herein needs to be amended to correct this scrivener's error.

CONCLUSION

As set out above, none of the arguments put forth by Stone in this appeal have merit and, except for correction of the clerical error in the judgment and sentence, Stone's conviction should be affirmed.

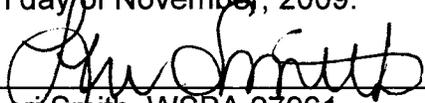
RESPECTFULLY SUBMITTED this 16th day of November, 2009.

MICHAEL GOLDEN
LEWIS COUNTY PROSECUTING ATTORNEY
by: 
LORI SMITH, WSBA 27961

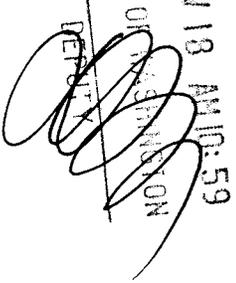
DECLARATION OF SERVICE BY MAIL

The undersigned declares under penalty of perjury under the laws of the State of Washington that a copy of this document was served upon the Appellant by placing a copy of said document in the United States mail, postage prepaid, addressed to Appellant's Attorney, John Hays, at his address in Longview, Washington.

Dated this 16th day of November, 2009.



Lori Smith, WSBA 27961

COURT OF APPEALS
DIVISION II
09 NOV 18 AM 10:59
STATE OF WASHINGTON
BY  DENITA